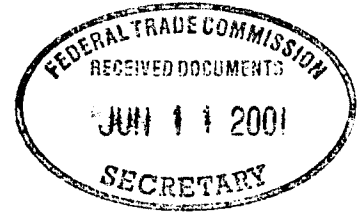


**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**



In the Matter of

**Schering-Plough Corporation,
a corporation,**

**Upsher-Smith Laboratories,
a corporation,**

and

**American Home Products Corporation,
a corporation**

Docket No. 9297

SCHERING-PLOUGH CORPORATION'S MOTION FOR A PROTECTIVE ORDER

Respondent Schering-Plough Corporation ("Schering") moves pursuant to 16 C.F.R. §§ 3.31(c) & (d) for a protective order preventing Complaint Counsel from taking the depositions of four outside members of Schering's Board of Directors: Patricia F. Russo is the Chairperson of Avaya, Inc. and serves as a director of New Jersey Manufacturers Insurance; Hans W. Becherer, former Chairman, CEO and COO of Deere & Company is currently a director of Honeywell, Inc. and J.P. Morgan Chase & Co.; Mr. Carl E. Mundy, former General and Commandant of the United States Marine Corps is currently a director of General Dynamics; and H. Barclay Morley, is the former Chairman and CEO of Stauffer Chemical Company.¹

Significantly, none of the four proposed deponents are Schering employees with active involvement in any matters at issue in this case. Rather, the individuals named in the Notice are all outside directors who are removed from the daily subjects of this matter. It would be a great burden for these busy professionals to prepare for and attend the noticed depositions; and, this burden is not outweighed by the value of the discovery that the FTC might obtain from these deponents, since Complaint Counsel can likely obtain more detailed information from Schering employees with superior knowledge and recollection of relevant facts.

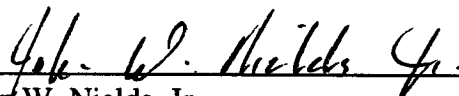
¹ Counsel for Schering and Complaint Counsel have endeavored to resolve the issues raised in this motion by agreement. Despite good faith effort on both sides, counsel were unable to reach such an agreement.

So far as Schering is aware, Complaint Counsel noticed these depositions because the four outside directors attended a Board of Directors meeting almost four years ago at which they heard a brief presentation regarding, and approved, the Upsher settlement at issue in the Complaint.² However, Schering has no information that suggests that any of the named directors has knowledge or recollection on that issue that would be equal to that of the Schering directors and employees who prepared and made the presentation to the Board or those Schering employees who have independent knowledge of relevant facts as a consequence of their active involvement in the matters at issue.

As such, a protective order denying the examination of the named directors is appropriate. Schering proposes that Complaint Counsel depose Schering employees who were more actively involved in the matters at issue in lieu of the noticed directors.

For the foregoing reasons and those set forth in the accompanying memorandum, Schering respectfully requests that the Court grant the motion for a protective order.

Respectfully submitted,



John W. Nields, Jr.
Marc G. Schildkraut
Laura S. Shores
Charles A. Loughlin
HOWREY SIMON ARNOLD & WHITE, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Respondent
Schering-Plough Corporation

Dated: June 11, 2001

² Schering's agreements with ESI Lederle were not submitted for board approval.

**UNITED STATES OF AMERICA
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**Schering-Plough Corporation,
a corporation,**

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a corporation**

Docket No. 9297

**MEMORANDUM IN SUPPORT OF SCHERING-PLOUGH CORPORATION'S
MOTION FOR A PROTECTIVE ORDER**

I. INTRODUCTION

Respondent Schering-Plough Corporation ("Schering") respectfully moves for a protective order to prevent Complaint Counsel from taking the depositions of four outside members of Schering's Board of Directors, Hans W. Becherer, H. Barclay Morley, Carl E. Mundy and Patricia F. Russo. *See* Notice of Deposition ("Notice") of Hans W. Becherer, H. Barclay Morley, Carl E. Mundy and Patricia F. Russo, dated May 22, 2001 (attached as Exhibit A).

A protective order should be granted in this case because these four outside directors have no unique personal knowledge of, or daily active involvement in, matters at issue in this case. The proposed deponents are busy professionals who would be burdened by having to prepare for and attend depositions regarding Schering's actions with which they have had little or no direct involvement. It is particularly inappropriate to impose such a burden on the four

proposed deponents when Complaint Counsel has failed to seek discovery from individuals who are likely to have far greater knowledge and recollection of relevant facts. Schering's proposal that Complaint Counsel depose Schering employees who were actively involved in matters at issue in this case is a reasonable alternative that will provide Complaint Counsel with the discoverable information they seek, without imposing undue burden on Schering's outside directors. Schering therefore respectfully requests that the Court grant its motion for a protective order.

II. ARGUMENT

This Court has the power to issue a protective order whenever such an order is needed to "protect a party or other person from . . . undue burden or expense." 16 C.F.R. § 3.31(d). Similarly, the Court may limit discovery if it is "obtainable from some other source that is more convenient, less burdensome or less expensive" or where the "discovery sought is unreasonably cumulative or duplicative." 16 C.F.R. § 3.31(c). Courts applying the analogous Federal Rule of Civil Procedure 26(c) routinely issue such orders when the burdens of the proposed discovery outweigh any likely benefit, or if alternative discovery methods are more convenient, less burdensome or less expensive. And such orders are particularly appropriate where, as here, a party seeks to depose busy officials at the top of the corporate structure when other officials with superior knowledge and recollection are available. *See Hughes v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Hughes v. General Motors Corp.*, 18 Fed. R. Serv.2d 1249 (S.D.N.Y. 1974).

Courts generally grant motions for protective orders sought by high level executives when others with equal or greater knowledge of relevant facts can be examined in their stead. *See High Tymes Prod., Inc. v. PRN Prod., Inc.*, No. C-1-93-298, 1994 U.S. Dist. LEXIS 21313, at *17 (S.D. Ohio Nov. 18, 1994); *Porazzi Co. v. The Mormaclark*, 16 F.R.D. 383, 383-84 (S.D.N.Y. 1951). In *Baine v. General Motors Corp.*, for example, the court specifically recognized that many corporate officers or directors may be "removed from the daily subjects of

litigation,” and therefore required litigants to depose first the individuals specifically designated by the company as having equal or greater knowledge of the facts relevant to the litigation. 141 F.R.D. 332, 334-35 (M.D. Al. 1991). Other courts have recognized these same principles in granting motions to quash the depositions of high-ranking corporate officials when individuals with at least equal knowledge are available. *See, e.g. Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Porazzi*, 16 F.R.D. at 383-84.

The depositions sought by Complaint Counsel implicate these same principles. Ms. Russo and Messrs. Morley, Becherer and Mundy are outside members of the board of directors who are removed from the “daily subjects” that form the basis of the FTC Complaint. None of the named directors is an officer or employee of Schering, and none has been involved in Schering’s day to day operations. Thus, none of the four directors is likely to have unique or detailed knowledge of Schering’s management, the development of K-Dur-20, the underlying patent litigations with Upsher and ESI, or the settlement agreements that form the foundation of the FTC Complaint.

Three of the directors are current or former Chief Executive Officers of large corporations, and several of them sit on the boards of other corporations in addition to Schering. Thus, the burden, inconvenience and disruption imposed by requiring these busy individuals to prepare for and attend depositions are not outweighed by any countervailing benefits that Complaint Counsel might gain from these depositions. As noted, none of the proposed deponents had any active, daily involvement in any of the matters at issue in this case, and Schering employees with greater involvement are available to be deposed. Thus, Complaint Counsel can obtain the information sought without taking the burdensome depositions contemplated by the Notice.


So far as Schering is aware, the Commission staff noticed the depositions because the named directors attended a single meeting of Schering’s Board of Directors approximately *four years ago*, at which they heard a brief presentation and approved the settlement of the Upsher patent litigation. However, of all the people attending this meeting, the four named directors

would appear to be the least likely to have any recollection of the settlement . Clearly, the individuals who prepared and made the presentation to the Board, or other members of the Board who were involved in Schering's day-to-day business, likely would possess greater knowledge and recollection of the facts relevant to the Upsher settlement. Yet, the FTC has not sought discovery from these individuals, and instead seeks to depose busy outside directors who are removed from the daily subjects of the litigation. This Court should not permit Complaint Counsel to take burdensome depositions of individuals removed from Schering's daily management when employees with greater involvement in the matters at issue could be deposed. *See Baine*, 141 F.R.D. at 334-35.

III. CONCLUSION

For the foregoing reasons Schering respectfully requests that this Court grant its motion for a protective order.

Respectfully submitted,



John W. Nields, Jr.
Marc G. Schildkraut
Laura S. Shores
Charles A. Loughlin
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1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Respondent
Schering-Plough Corporation

Dated: June 11, 2001

CERTIFICATE OF SERVICE

I hereby certify that this 11th day of June, 2001, I caused an original, one paper copy and an electronic copy of Schering-Plough Corporation's Motion for a Protective Order and Memorandum in Support of Schering-Plough Corporation's Motion for a Protective Order to be filed with the Secretary of the Commission, and that two paper copies and an electronic copy were served by hand upon:

Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room 104
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

and one paper copy was hand delivered upon:

Richard A. Feinstein
Assistant Director
Bureau of Competition
Federal Trade Commission
Room 3114
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Karen Bokat
Bureau of Competition
Federal Trade Commission
Washington, D.C.
601 Pennsylvania Ave, N.W.
Washington, D.C. 20580

Christopher Curran
White & Case LLP
601 13th St., N.W.
Washington, D.C. 20005

Cathy Hoffman
Arnold & Porter
555 12th St., N.W.
Washington, D.C. 20004



Erik T. Koons



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition

May 23, 2001

Via Federal Express and electronic mail

Laura S. Shores, Esq.
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2402

Re: Federal Trade Commission v. Schering-Plough Corporation, et al.
Docket No. 9297

Dear Ms. Shores:

On behalf of Complaint Counsel, I have enclosed a copy of the Notice of Deposition. If you have any questions or concerns, do not hesitate to call me at (202) 326-2079.

Sincerely,


Yaa A. Apori

Enclosure

cc: Cathy Hoffman, Arnold & Porter
Christopher Curran, White & Case

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of

SCHERING-PLOUGH CORPORATION,
a corporation,

UPSHER-SMITH LABORATORIES, INC.,
a corporation,

and

AMERICAN HOME PRODUCTS
CORPORATION,
a corporation.

Docket No. 9297

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE, that pursuant to Rule 3.33(a) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings, complaint counsel will take the deposition of the following persons at the designated time.

Deponent

Date

Mr. Hans W. Becherer
Director, Schering-Plough Board of Directors
Schering-Plough Corporation

June 11, 2001 at 9:30 a.m.

Mr. H. Barclay Morley
Director, Schering-Plough Board of Directors
Schering-Plough Corporation

June 12, 2001 at 9:30 a.m.

Mr. Carl E. Mundy
Director, Schering-Plough Board of Directors
Schering-Plough Corporation

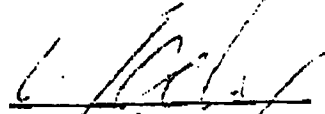
June 13, 2001 at 9:30 a.m.

Ms. Patricia F. Russo
Director, Schering-Plough Board of Directors
Schering-Plough Corporation

June 14, 2001 at 9:30 a.m.

This depositions will be conducted before some person authorized by law to administer oaths, and will continue from day to day until completed. The testimony will be recorded by stenographic means. The deposition will be taken at the offices of the Federal Trade Commission, 601 Pennsylvania Avenue, N.W.

Respectfully Submitted,



Yaa Apori
Complaint Counsel

Dated: May 22, 2001

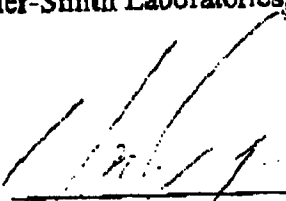
CERTIFICATE OF SERVICE

I, Yaa A. Apori, hereby certify that on May 23, 2001, I caused a copy of the Notice of Deposition to be served upon the following by Federal Express and electronic mail:

Laura S. Shores, Esq.
Howrey Simon Arnold & White, LLP
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202-783-0800
Attorney for respondent Schering-Plough Corporation

Cathy Hoffman, Esq.
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Washington, D.C. 20004-1206
Attorney for respondent American Home Products Corporation

Christopher M. Curran, Esq.
White & Case LLP
601 13th Street, NW
Washington, DC, 20005
Attorney for respondent Upsher-Smith Laboratories, Inc.



Yaa A. Apori
Complaint Counsel